Supreme Court, U.S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1967

IMPERIAL DISTRIBUTORS, INC.; LITTLE BOOK SHOPS, INC.; PALACE BOOK SHOP, INC. d/b/a PALACE THEATER; K.I.M. REALTY, INC.; GEMINI ENTERPRISES, INC.; EAGLE PUBLICATIONS, LTD.; and KENNETH GUARINO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; EDWARD F. HARRINGTON; CHARLES E. CHASE; EDWARD M. KAVANAGH, S.A.; PHILIP G. REILLY, S.A.; COLONEL ANGELO RICCI; SGT. VINCENT VESPIA, JR.; SGT. RONALD J. URSO; DET. ALFRED HAMEL; and LAWRENCE GILLIGAN, S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Herald Price Fahringer, Esq.
Paul J. Cambria, Jr., Esq.
Attorneys for Petitioners
Barbara Davies Eberl, Esq.
On the Petition
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Nelson Baker, Esq.
Ten Post Office Square
Suite 615
Boston, Massachusetts 02109
(617) 482-5177

William E. Seekford, Esq.
1302 Penthouse
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6868
Of Counsel

The Daily Record
Rochester, New York
(6114)
Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

	Page
Table of Cases	*ii*
Opinion Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	3
Preliminary Statement	3
Statement of Facts	4
The Search of the Truck	4
Outline of Events of February 28, 1978	6
Procedural History	6

Reasons for Granting the Writ

I. This Court's decision in *DiBella v. States*, 369 U.S. 121 (1962), does not require the dismissal of the appeal of the order denying petitioners' motion for return, especially when there has been no indictment 27 months after the illegal seizure.	8
II. The order to stop and earch a truck for the *purpose* of determining whether probable cause exists to seize books and films that are presumptively protected violates the First and Fourth Amendments of the United States Constitution.	12
Conclusion	17

Appendices

Appendix A. Opinion of the United States Court of Appeals for the First Circuit	A-1

Page

Appendix B. Memorandum and Order of the United States District Court for the District of Massachusetts A-9

Appendix C. Constitutional Provisions and Statutes Involved. A-16

TABLE OF CASES

Page

DiBella v. United States, 369 U.S. 121 (1962) 7, 8, 9

Heller v. New York, 413 U.S. 483 (1973) 15

Lee Art Theater, Inc. v. Virginia, 392 U.S. 636 (1968) . . 15

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) . 15, 16, 17

Marcus v. Search Warrants, 367 U.S. 717 (1961) 15

A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964). 15

Roaden v. Kentucky, 413 U.S. 496 (1973) 15

Stanford v. Texas, 379 U.S. 476, 485 (1965). 13

In The

Supreme Court of the United States

October Term, 1979

No.

IMPERIAL DISTRIBUTORS, INC.; LITTLE BOOK SHOPS, INC.; PALACE BOOK SHOP, INC. d/b/a PALACE THEATER; K.I.M. REALTY, INC.; GEMINI ENTERPRISES, INC.; EAGLE PUBLICATIONS, LTD.; and KENNETH GUARINO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; EDWARD F. HARRINGTON; CHARLES E. CHASE; EWARD M. KAVANAGH, S.A.; PHILIP G. REILLY, S.A.; COLONEL ANGELO RICCI; SGT. VINCENT VESPIA, JR.; SGT. RONALD J. URSO; DET. ALFRED HAMEL; and LAWRENCE GILLIGAN, S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, IMPERIAL DISTRIBUTORS, INC.; LITTLE BOOK SHOPS, INC.; PALACE BOOK SHOP, INC. d/b/a PALACE THEATER; K.I.M. REALTY, INC.; GEMINI ENTERPRISES, INC.; EAGLE PUBLICATIONS, LTD.; and KENNETH GUARINO, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on March 21, 1980.

Opinion Below

The Court of Appeals opinion, dated March 21, 1980, is not yet reported, but is printed in Appendix A, *infra*, at P. A-1, *et seq*. The memorandum and order of the district court is printed in Appendix B, *infra*, at p. B-1, *et seq*.

Jurisdiction

On May 15, 1979 petitioners brought an action in the United States District Court of Massachusetts under Rule 41 of the Federal Rules of Criminal Procedure for the return of all the property illegally seized by the Government from petitioners' truck in Boston on February 28, 1978. On May 30, 1979 after a hearing, the district court denied petitioners' request on the grounds that the seizure violated no constitutional rights of petitioners.*

On March 21, 1980 the First Circuit dismissed the appeal for lack of jurisdiction, holding that the purpose of petitioners' motion in the district court was the suppression of evidence, not the return of property seized, thus rendering the order a non-appealable interlocutory decision.

This petition for a writ of certiorari is filed within ninety days of that decision. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions and Statutes Involved

The constitutional provisions and statutes involved are contained in our Appendix C.

---

*Further, the order denied the motion with respect to any property seized in Rhode Island because the material was not confiscated in the District of Massachusetts.

Questions Presented

1. How long must a citizen wait before an application for the return of his illegally seized books and films can be successfully made?

2. Does a search warrant's failure to describe the books and films sought to be seized, as well as the magistrate's participation in the search, violate the First and Fourth Amendments to the United States Constitution.

Preliminary Statement

On February 28, 1978 an order and a search warrant were issued in Boston to search a truck full of films and magazines. Neither the order nor the warrant authorized the seizure of any materials whatsoever. They directed merely that agents determine whether there was probable cause for a possible future seizure.

Pursuant to these illegal documents, the entire truck was confiscated and impounded. Later at the FBI garage a magistrate participated in the search, determining that certain films and magazines were obscene. Thereafter, those items were seized from the impounded truck.

Petitioners immediately moved for the return of their property since no criminal action had been instituted. They unsuccessfully pursued this remedy through the federal courts in Rhode Island which eventually held that Massachusetts was the proper forum for vindication of these rights.

On May 30, 1979 a hearing was held in the District Court of Massachusetts. In upholding the search, the court unjustifiably sanctioned the novel and unprecedented two-step procedure of issuing an "order" to search materials to determine if probable cause exists for their ultimate seizure. The United States Court of Appeals for the First Circuit dismissed the appeal, holding that the order was a non-appealable interlocutory order.

In a few words that is what this case is all about except to say that it raises the critical issue of whether a citizen can be denied all remedies to recover his property where the prosecutor has deliberately refused to institute a criminal action.

Statement of Facts

The legal voyage of petitioners' case has ranged through the federal courts of Rhode Island, up to the edge of this Court,* back to the federal district court in Massachusetts, through the First Circuit Court of Appeals and ultimately has once again come to rest on the shores of this Court. Despite this rather complex procedural background, we have tried to recruit only the most relevant facts from this rather long and cumbersome history of the case. A study of the procedural events is aided by dividing them under convenient subheadings.

The Search of the Truck

On February 28, 1978, Magistrate Lawrence P. Cohen of Boston, Massachusetts, issued an "order" commanding federal agents to search one of petitioners' trucks:

> ". . . *in order to determine whether or not there exists therein obscene materials of the same tenor* as 'Turkish Delight', 'Sex Photo Fiction No. 1' and 'Sex Photo Fiction No. 2'" (emphasis supplied).

A search warrant was also issued directing a search of the same truck for:

> ". . . a quantity of obscene materials including books, pamphlets, magazines, newspapers, films and prints."

No specific titles or descriptions were given to guide the agents in their quest; they were simply permitted to roam at will

*Petitioners barely missed gaining entry to this Court in April, 1979 when three justices voted in favor of granting certiorari.

in search of so-called "obscene materials of the same tenor. . . ." The order and warrant were based upon an FBI agent's affidavit, apparently unsigned. Based upon this order and search warrant, petitioners' truck was stopped; the driver was arrested; and the entire truck and its contents, including magazines, films, and business records, were seized and impounded at the FBI garage in Boston. This massive seizure was conducted without any prior judicial determination that the van's contents were obscene.*

As a result of this illegal seizure, an FBI agent examined the books and films and concluded they were obscene. He then prepared a second affidavit requesting that the magistrate issue a "search warrant" for nine magazines and five films already confiscated. The agent's affidavit did not describe the contents of the books or films, foreclosing a neutral and detached determination of their obscenity by the magistrate. Business records seen in the truck were also identified as property which should be seized.

Thereafter, the federal magistrate went to the FBI garage and examined the contents of the impounded truck. He issued a second warrant authorizing a "seizure" of three of each of the magazines and two of each of the films which had already been seized. Confiscation of all petitioners' business records was also ordered. The magistrate made no specific findings regarding each of the magazines or films seized. The significant events of February 28, 1978 are outlined on the following page.

---

*The charges lodged against the driver were eventually dismissed after the government elected not to prosecute. However, the nine magazines and five films found in the van were "used" to gain search warrants for several subsequent searches as will be described *infra*.

Outline of Events of February 28, 1978

11:05 a.m. Magistrate issues order authorizing search of truck to determine whether probable cause exists;

Search warrant issued which failed to specify magazines or to command seizure.

Imperial Distributors' truck stopped and searched; driver arrested; truck impounded at FBI headquarters.

FBI Garage

Search by FBI continued and contents of truck catalogued and second application for search warrant prepared;

Magistrate appears at FBI headquarters and participates in search, issuing warrant for materials already seized;

5:30 p.m. Magistrate enters order justifying prior seizure and offers post-seizure adversary hearing.

Procedural History

On March 29, 1978 petitioners moved in federal district court in Rhode Island for return of their illegally seized property. On December 5, 1978 the Honorable Raymond G. Pettine ordered petitioners to seek relief in the district court in Massachusetts. In response, petitioners filed a petition for a writ of mandamus in the First Circuit, asking that Judge Pettine be directed to enter a judgment on the merits. The First Circuit denied the

application without opinion on January 4, 1979, thus agreeing that the proper forum for petitioners' return motion was the District of Massachusetts. (A petition to this Court for a writ of certiorari was denied.) On May 15, 1979 petitioners filed a motion for return of the seized property and/or suppression under Rule 41. On May 30, 1979 a hearing was conducted before the Honorable Walter J. Skinner.

At the hearing, the court seemed very troubled by the procedures employed by the government in seizing the van by the "two-step process."* However, in his Memorandum and Order of July 12, 1979, Judge Skinner ruled that "the two-stage procedure employed in this case is a reasonable response to the problem [of obtaining a magistrate's review of allegedly obscene material in the hands of wholesalers and distributors] . . ." Moreover, the court failed to come to grips with the most basic flaw in the procedure leading to the seizure of the books and films — namely, the magistrate's extraordinary "order" permitting a search for materials of the same "tenor" as *Turkish Delight*, *Sex Photo Fiction No. 1*, and *Sex Photo Fiction No. 2*. Rather, Judge Skinner contrived a novel basis for justifying the search conducted and denied petitioners' motion for a return of the seized property.

The First Circuit dismissed petitioners' appeal for lack of jurisdiction, holding that the motion seeking return of the property was essentially a suppression motion and therefore its denial was a non-appealable interlocutory order. The court based its ruling on *DiBella v. United States*, 369 U.S. 121 (1962), and relegated petitioners to the intolerable prospect of an endless delay in getting their property back. The Court held,

---

*THE COURT: "What are you protecting them from? You do the very thing you claim to protect them from when you stop them in the middle of the street and arrest the driver. Good grief! I don't understand that. I don't see anything in the rules or any case I've ever read which authorizes that kind of a procedure."

"If there is an indictment and conviction, the constitutionality of the search and seizure will be reviewed. If there is no indictment and the property is not returned, [petitioners] can then move for its return." To date, petitioners have waited 27 months without any form of relief.

The Court of Appeals, by refusing to consider petitioners' case, has sentenced them to a procedural purgatory. How long must petitioners reasonably be expected to wait before their legitimate Fourth Amendment claims will be vindicated? With this critical question in mind, we turn immediately to the substantial reasons why the writ should be granted.

Reasons for Granting the Writ

I

This Court's decision in *DiBella v. United States*, 369 U.S. 121 (1962), does not require the dismissal of the appeal of the order denying petitioners' motion for return, especially when there has been no indictment 27 months after the illegal seizure.

Twenty-seven months have passed and no criminal prosecution has been commenced against petitioners Imperial Distributors or Kenneth Guarino or any other aggrieved parties who were subjected to the unlawful seizure of their property on February 28, 1978. On May 15, 1979, when the seized items had not been voluntarily returned and no indictment was forthcoming, petitioners moved in the United States District Court for the District of Massachusetts pursuant to Federal Rule of Criminal Procedure 41(e) for "return of property and entry of appropriate writs to effectuate the relief requested. . . ."

A hearing was conducted before the Honorable Walter J. Skinner on May 30, 1979. In a decision filed July 12, 1979 the court denied the "motion to return seized property." On appeal the First Circuit held that the "primary purpose of the motion

was suppression . . ." and thus this Court's decision in *DiBella v. United States*, 369 U.S. 121 (1962), precluded appeal of the court's order denying the motion. However, the First Circuit has offered no answer to petitioners' obvious question of how long they must wait for an indictment before their property can be returned. In *DiBella*, this Court wrote:

> "When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information or indictment — in each such case the order on a suppression motion must be treated as 'but a step in the criminal case preliminary to the trial thereof' " (369 U.S. at 131).

With respect to the status of the "case" in the district court, there is outstanding:

1. No complaint;
2. No arrest;
3. No detention or release on bail following arrest;
4. No arraignment;
5. No information; and
6. No indictment.

The Government has been in illegal possession of petitioners' property for almost two and a half years. It tests credibility to ask this Court to believe that it takes approximately 27 months to investigate and present an obscenity case to a grand jury. Under these circumstances the Government has delayed unreasonably in commencing the proceedings. Since there is no prosecution *in esse*, the motion was one of return and thus is appealable. Moreover, any prosecution is unforeseeable at this time and therefore too remote from petitioners' motion to deprive the district court's order of finality. The First Circuit's holding has effectively denied appellate review of petitioners' justifiable claims of illegal search and seizure.

Unless this Court grants the petition for certiorari to review the erroneous judgment below, petitioners as the aggrieved parties have no adequate remedy at law and remain at the mercy of the whims of the prosecutor's office. If the Government has been in possession of the materials for nearly two and a half years and still not made any accusation, one cannot reasonably predict when, or if, one will ever be forthcoming.

Second, the seizure of presumptively protected materials has irreparably injured petitioners' business. Finally, petitioners' major claim revolves around the illegal seizure without probable cause and in defiance of a legal and proper warrant and prior judicial scrutiny of presumptively protected materials. The legality *vel non* of the search and seizure will remain unanswered unless this Court grants certiorari.

The importance of this seizure is magnified by the historical events that followed. The parade of horrors that occurred in the wake of this original seizure is staggering. The fruits of the Boston truck seizure and all information that was derived from this unwarranted excursion were transmitted to another FBI agent who made an application before a federal magistrate in Rhode Island to search Imperial Distributors' premises in Providence. The entire core of that application was the agent's first affidavit upon which the primary illegal order and warrant were issued. A warrant for Imperial Distributors was issued by the federal magistrate in Rhode Island on the same day, February 28, 1978. The warrant authorized the seizure of all the magazines and films found in the van; the three magazines which had been originally brought to the Massachusetts magistrate (*Sex Photo Fiction No. 1*, *Sex Photo Fiction No. 2*, and *Turkish Delight*) and which were the subject of the first "tenor" order; and various business records of Imperial Distributors.

The search of Imperial Distributors was conducted by numerous federal, state, and local agents who seized every

conceivable business and personal record of Imperial Distributors, Kenneth Guarino, Eagle Productions, Ltd., Little Book Shops, Inc., Palace Book Shop, Inc. d/b/a Palace Theater, K.I.M. Realty, Inc., and Gemini Enterprises, Inc., *none of which people or organizations were named in the warrant.* None of the materials were ever subjected to any judicial scrutiny. State police also confiscated much material and presented it to a Rhode Island state judge.

On May 2, 1978 a Rhode Island state judge issued a warrant for Imperial Distributors premises which was executed by Rhode Island police and federal agents. None of the material named in the warrant was seized but 21 other films were confiscated. In addition, the officers maliciously and intentionally destroyed and/or made unsuitable for dissemination hundreds of presumptively protected materials.

On March 8, 1978 respondents Reilly, Hamel and Urso appeared at 208 Laurel Hill Avenue, Providence on the pretext of a fire inspection. In the absence of a warrant, they scoured the entire Imperial Distributors premises to gain illegal knowledge to exploit in yet another unlawful warrant.

On March 10, 1978 a Rhode Island judge sitting in Cranston issued a warrant for business records of Imperial Distributors and Eagle Productions, Ltd. This third entry of the corporation resulted in another massive seizure of at least 312 films and magazines (from 33-A Oakdale Avenue, Johnston, Rhode Island).

Thus it can be seen that the February 28, 1978 search of the truck becomes the linchpin of all the other illegal searches. What the government has effectively done is to forestall petitioners' remedies in other jurisdictions, (*e.g.*, Rhode Island) by simply withholding evidence in this case, thereby immobilizing all of petitioners' legitimate Fourth Amendment claims.

If these procedures are endorsed by this Court, the Fourth Amendment, as well as the First Amendment, will become a Flanders Field. The government will effectively be able to frustrate all efforts of a citizen to gain the return of his property by simply declining to initiate criminal prosecution. This grievous situation is constitutionally intolerable and therefore the case deserves the Court's attention.

II

This case presents a unique question, never before considered by this Court. That issue, simply stated, is:

(1) Can a magistrate issue an order to stop and search a truck for the *purpose* of determining whether probable cause exists to seize books and films that are presumptively protected by the First Amendment?

A subsidiary issue is:

(2) Should a new exception be made to an old and well established tenet that, to be valid, a search warrant must particularly describe the items to be seized, especially when these items come under the protective mantle of the First Amendment?

If this Court is to keep faith with an unbroken series of cases extending over a long stretch of the First Amendment's history, the answer to both of these questions must be "no". This unprecedented issuance of an order to search for probable cause is in direct defiance of Rule 41 and is unsupported by any statute or case. The constitutional defects which plague the order of seizure are numerous, as well as obvious. For example, the order and warrant fail to conform to the most rudimentary requirements of Rule 41(c)(1). The important procedural safeguards which must be fulfilled before a citizen's property can be taken are:

(1) A finding of probable cause;

(2) Identification of the property;

(3) Naming or describing person or place to be searched;

(4) Execution of the warrant within ten days of issuance;

(5) Designation of a federal magistrate for return.

The order and warrant issued which resulted in the truck's seizure failed to meet any of these prerequisites. For instance:

(1) The order does not satisfy the requirement of a finding of probable cause by the issuing magistrate;

(2) Neither the order nor the warrant describe in any detail whatsoever the property to be seized;

(3) The order does not direct *seizure* — it merely mandates a search to determine the existence of probable cause;

(4) The order lacks any time limitation for execution;

(5) The order fails to provide for timely execution;

(6) The order does not set forth any procedures for a return.

From any view, this challenged warrant contravenes every branch of the law governing the issuance of search warrants and thus cannot be sustained. Furthermore, the most blatant defect, the failure to particularize, was further exacerbated by the contemporaneous issuance of the even more deficient document loosely labeled a search warrant. This requirement of particularity, which the warrant failed to meet, "is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

Here there was a complete failure to specify the books and films to be seized. The first warrant which authorized the seizure of "a quantity of obscene materials including books, pamphlets, magazines, newspapers, films and prints", without specifying in any way the actual materials to be confiscated, failed to limit the discretion of the agents and unlawfully permitted them to rummage through the contents of the van and seize what, *in their opinion*, offended the law. This is not the

proper function of a police officer; rather it is to be fulfilled by a neutral and detached magistrate whose task it is to "focus searchingly" on the question of obscenity.

Moreover, even the order which authorized the initial search for "materials of the same tenor as *Turkish Delight*, *Sex Photo Fiction No. 1* and *Sex Photo Fiction No. 2*" acted as no constitutional balm for the deficiencies of the initial search warrant, and indeed, the rather foreign process was infected with its own legal shortcomings. For example, one cannot even ascertain from the so-called "order" the specific qualities which come within the elusive phrase the "same tenor" of materials identified. We do not know whether these publications are magazines or films. Nor does the unsigned affidavit of the agent fill this constitutional void.* He merely gave a cursory description of the front and back cover of *Turkish Delight* and an extremely broad summary of the contents of *Sex Photo Fiction No. 1* and *Sex Photo Fiction No. 2* which failed to in any way file down the expansive provisions of the order. Since neither the preeminent order and search warrant specified with requisite particularity the materials to be seized from the van, especially in the context of the First Amendment, all items confiscated must be returned and/or suppressed on this ground alone.**

*It was conceded at oral argument that the first order and warrant did not have a copy of the agent's affidavit attached.

**Further, the only access to the contents of the van was gained pursuant to the initial unlawful order and warrant. All other materials seized pursuant to all subsequent process must be suppressed and/or returned because such materials constitute the illegal booty of the initial and primary wrongful entry. *See supra*.

No Prior Judicial Determination of Obscenity

Another constitutional failure involves the lack of any detached analysis of the publications and films by a neutral magistrate prior to issuing the first order and warrant. Thus, there is no proper finding of probable cause for the seizure of the actual materials confiscated.

Prior to issuing the facially deficient order, which was the source of the subsequent order and warrants, the magistrate allegedly examined only *Turkish Delight*, *Sex Photo Fiction No. 1* and *Sex Photo Fiction No. 2*. These publications, however, were never associated with his particular van, nor were they for that matter, even found in the truck. Thus, the nine publications and five films which were taken from the van were only examined by a magistrate *after* their seizure.

It has been repeatedly held that ordinary rules of arrest, search and seizure are inapplicable where First Amendment freedoms are concerned. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Heller v. New York*, 413 U.S. 483 (1973); *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961).

The prerequisite of a prior judicial investigation of obscenity guarantees to all of us that the sensitive determination of probable cause concerning the obscenity of materials will be made by an impartial magistrate. This decision cannot be left to those who are involved in the competitive enterprise of prosecuting crimes. Here, there was no question that the first order and warrant permitted the agent to act as the sole arbiter of obscenity. Furthermore, the magistrate's inspection of the materials at the FBI garage does not satisfy this well-reasoned rule.

Recently, this Court condemned the procedures followed in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), by declaring they were "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect" (*Id.* at 325). The Court wrote:

> "Based on the conclusory statement of the police investigator that other similarly obscene materials would be found at the store, the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. . . . *Nor does the Fourth Amendment countenance open-ended warrants, to be completed while a search is being conducted and items seized or after the seizure has been carried out*" (*Id.*; emphasis supplied).

The Court rejected the state's contention that the presence and participation of the Town Justice ensured that no items would be seized absent probable cause to believe they were obscene and that his presence was tantamount to an immediate adversary hearing on the issue.

Our case presents a factual situation which is a variation of that condemned by this Court in *Lo-Ji*. The first order and warrant were, in essence, open-ended writs designed to illegally gather information about the contents of the trucks, which was unlawfully seized on the streets of Boston. The second warrant which purported to authorize a seizure of specific publications and films was "filled in" after the truck was seized and searched pursuant to the first order. A novel and unprecedented two-step procedure has been created here which will invite and authorize magistrates throughout the country to issue "orders" to determine probable cause, prior to the issuance of the search warrant to seize the actual property. Such practice is constitutionally intolerable. Thus, it commands no more respect than the warrant condemned in *Lo-Ji Sales, Inc.*

Under the clear and unmistakable language of *Lo-Ji*, *Marcus*, *Quantity of Books*, *Lee Art Theatre*, and *Roaden*, the unauthorized search and seizure challenged here must be struck down. It would be a serious insult to the scholarship of this Court to suggest that the unprecedented manner of this seizure can be tolerated under these well-established principles. For all the foregoing reasons, the petition for certiorari should be granted.

CONCLUSION

For all the foregoing reasons and authorities, the petition for certiorari should be granted.

Respectfully submitted,

Herald Price Fahringer, Esq.
Paul J. Cambria, Jr., Esq.
Attorneys for Petitioners
Barbara Davies Eberl, Esq.
On the Petition
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Nelson Baker, Esq.
Ten Post Office Square
Suite 615
Boston, Massachusetts 02109
(617) 482-5177

William E. Seekford, Esq.
1302 Penthouse
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6868
Of Counsel

June, 1980

Appendices

APPENDIX A—Opinion of the United States Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1361

IMPERIAL DISTRIBUTORS, INC., ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For the District of Massachusetts

[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before
Coffin, *Chief Judge*,
Bownes, *Circuit Judge*,
Wyzanski,* *Senior District Judge*.

Herald Price Fahringer, with whom *Paul J. Cambria, Jr.*, *Barbara Davies Eberl*, *Lipsitz, Green, Fahringer, Roll, Schuller & James*, *William E. Seekford*, and *Nelson Baker* were on brief, for appellants.

Charles E. Chase, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellees.

---

*Of the District of Massachusetts, sitting by designation.

APPENDIX A—Opinion of the United States Court of Appeals for the First Circuit

March 21, 1980

Bownes, *Circuit Judge.* Petitioners-appellants[1] challenge the denial of their preindictment motion for the return and/or suppression, pursuant to Fed.R.Crim.P. 41(e), of business records, films, and magazines seized under authority of a warrant by federal agents from a truck owned by petitioner Guarino on February 28, 1978. The motion is predicated upon petitioners' contention that the underlying affidavit failed to establish a nexus between the materials sought and the van seized; that much of the supporting information was stale; that the magistrate, using a bifurcated approach, improperly found that there was probable cause; that the warrant contained numerous facial defects; and that there was no preseizure judicial determination of obscenity.

The procedural travel of this case began shortly after the seizure with the filing of a motion for return of property under Rule 41(e) in the United States District Court for the District of Rhode Island. At the conclusion of a two-day trial, Judge Pettine denied the motion because it was within the purview of the Massachusetts District Court, and stayed the action "pending the decision ofthe Massachusetts District Court." We denied appellants' petition for a writ of mandamus to order Judge Pettine to dissolve his abstention order and to enter a judgment on the merits (No. 78-1559, January 4, 1979); and the Supreme Court of the United States denied a petition for writ of certiorari, ____ U.S. ____, 99 S.Ct. 2042, 60 L.Ed.2d 402 (1979). Petitioners next filed a motion for the return of their property with the United States District Court for the District of

---

[1]Petitioners in this action are six Rhode Island corporations: Imperial Distributors, Inc.; Little Book Shops, Inc., Palace Book Shop, Inc. d/b/a Palace Theater; K.I.M. Realty, Inc.; Gemini Enterprises, Inc.; Eagle Publications, Ltd.; and Kenneth Guarino, an officer of Imperial.

Massachusetts. In its opinion reported at 473 F. Supp. 294 (D. Mass. 1979), the district court ruled that the three named magazines were obscene; that the bifurcated search and seizure was a "reasonable response to the problem" of establishing probable cause that wholesalers and distributors were engaging in the illegal interstate shipping of obscene materials; denied the motion for return of property seized within the District of Rhode Island on jurisdictional grounds; and denied the motion concerning property seized in Boston "because the seizure violated no constitutional rights of the plaintiffs." *Id.* at 298. Appeal to this court ensued.

Appellee contends that the order appealed from is interlocutory and not a final order subject to appellate review under 28 U.S.C. §1291.[2] Petitioners argue that it is a final order and further assert that appellee should be estopped from raising its jurisdictional objections because it did not move "to dismiss the appeal upon service of the notice"; because "the United States Attorney engaged in negotiations with defense counsel regarding the contents of the appendix"; and because appellants "expended great effort, time and expense in perfecting the appeal."

The question of appellate jurisdiction cannot be decided on the grounds of estoppel. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951). Should we conclude that the order is interlocutory, we must dismiss the appeal; the question of a court's jurisdiction may be raised at any time by the parties or *sua sponte* by the court. *Compagnie Nationale Air France* v. *Castano*, 358 F.2d 203, 206 (1st Cir. 1966).

---

[2]28 U.S.C. § 1291 provides: "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts." None of the provisions for appealability of interlocutory decisions specified in 28 U.S.C. § 1292 pertain here.

APPENDIX A—Opinion of the United States Court of Appeals for the First Circuit

Appellate courts cannot review interlocutory decisions, absent specific congressional authorization, because to do so would encourage "piecemeal disposition on appeal of what for practical purposes is a single controversy. . . ." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). The "finality doctrine," codified in 28 U.S.C. §1291, proscribes "appeal from any decision which is tentative, informal or incomplete." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).

In *DiBella* v. *United States*, 369 U.S. 121 (1962), the Supreme Court directly addressed the question of whether the denial of a preindictment Rule 41(e) motion for the return and suppression of illegally seized property was appealable. It held:

> We hold, accordingly, that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. Presentations before a United States Commissioner, *Go-Bart Co.* v. *United States*, 282 U.S. 344, 352-354, as well as before a grand jury, *Cobbledick* v. *United States*, 309 U.S. 323, 327, are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment — in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." *Cogen* v. *United States*, 278 U.S. 221, 227. Only if the motion is solely for return of property and is in no way tied to a criminal prosecution

> *in esse* against the movant can the proceedings be regarded as independent.

Id. at 131-32.

In *Shea* v. *Gabriel*, 520 F.2d 879, 881-82 (1st Cir. 1975), we grappled with, but found unnecessary to resolve, the two questions inherent in the last sentence of the *DiBella* holding. "What does 'solely' mean in this context? When is a criminal prosecution *in esse*?" In discussing the first question, we pointed out that some courts have held that a motion is not "solely for return of property" when it also seeks suppression, while others have allowed an appeal from that part of the order denying return of the property. We observed that splitting a 41(e) motion into two parts for a *DiBella* analysis exalted form over substance. *Id.* at 82, n.6.

The words of Fed.R.Crim.P. 41(e) effectively eliminate any distinction between a motion for return of property and a motion to suppress. The rule provides:

> (e) *Motion for Return of Property.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Under the rule, if the property is restored, "it shall not be admissible in evidence at any hearing or trial." And a motion for return of the property is to be treated as one to suppress after an information or an indictment is filed. Appealability cannot turn on the title of the motion since the rule gives the same effect to both and merges a motion for return of property into one for suppression after indictment.

Appellants, here, entitled their motion, "Motion For Return Of Property And Entry Of Appropriate Writs To Effectuate The Relief Requested Herein." No mention is made in the twenty-eight page motion of Fed.R.Crim.P. 41(e), but the separate notice of motion filed in the district court states, "a motion will be made pursuant to Rule 41 of the Federal Rules of Criminal Procedure for a return of property and other further appropriate relief." And in their reply brief, appellants state, "plaintiffs-appellants moved in the U.S. District Court for the District of Massachusetts pursuant to Federal Rule of Criminal Procedure 41(e) for 'return of property and entry of appropriate writs to effectuate the relief requested. . . .'" The relief requested was to order the searches and seizures of those warrants herein to be illegal and quashed, the evidence derived thereby suppressed, and order the return of the same. . . ." There can be no doubt that, regardless of its caption, this was a motion under Fed.R.Crim.P. 41(e).

After a review of what transpired and an examination of appellants' motions and briefs, we conclude that the primary purpose of the motion was suppression, not return of the materials seized. Three copies of nine magazines and two copies of five films out of a total of thirty-eight cartons of magazines and films were seized. Original business records were also taken, but the government offered to make copies available to appellants. To date, appellants have not responded to this offer.

Significantly, appellants have not argued that they need the property seized and that irreparable harm will result from failure to return it. *See Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F.2d 15, 17 (7th Cir. 1978) (motion solely for return of property). Even were we to follow those courts that split a motion for return and suppression into two parts, we could not do so here because this is solely a motion to suppress. What appellants seek is to prevent the grand jury that is investigating them and their activities from considering the materials seized and to bar their use as evidence in any subsequent trial. Since the motion here primarily seeks the suppression of evidence, it does not satisfy the "solely for return" requirement of *DiBella*. *See Application of United States*, 427 F.2d 1140, 1141 (5th Cir. 1970).

We recognize, however, that *DiBella* is not on all fours with this case. In *DiBella*, there was arrest, arraignment and indictment; here, we have a grand jury investigation that has extended from March 30, 1978, to the present without any indictment. *DiBella* holds that a suppression motion is to be treated as a step in the criminal process preliminary to the trial, "[w]hen at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment. . . ." 369 U.S. at 131. None of this has taken place here. We think, however, that where the motion is primarily for suppression of potential evidence and where the person affected is the subject of an ongoing grand jury investigation that the "finality doctrine" of 28 U.S.C. §1291 and the teachings of *Cobbledick* v. *United States*, 309 U.S. 323, and *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, preclude appeal at this juncture.

We have been unable to find any cases holding that the denial of a suppression motion was appealable where there was an

ongoing grand jury proceeding. In a case analogous to this, *Church of Scientology of California* v. *United States*, 591 F.2d 533 (9th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3463 (Jan. 22, 1980), the Court held that such a motion was not appealable. After reviewing the pertinent cases, it noted, "[t]he principle that runs through all of these authorities is that an ongoing criminal proceeding is not to be interrupted by an appeal from an order denying suppression of evidence that may be used in that proceeding." *Id.* at 536. The Fifth Circuit in *United States* v. *Glassman*, 533 F.2d 262 (5th Cir. 1976), held:

> This motion, made pursuant to Fed.R.Crim.P. 41(e), was made prior to appellant's indictment, but "the mere circumstance of a preindictment motion" does not make the order final and appealable. *DiBella* v. *United States*, 369 U.S. 121, 131, 82 S.Ct. 654, 660, 7 L.Ed.2d 614, 621 (1962). Only if this motion was a collateral attempt to retrieve property and not an effort to suppress evidence in related criminal proceedings is it appealable.

Id. at 263. *See also Simons* v. *United States*, 592 F.2d 251, 252 (5th Cir. 1979).

This case does not fall within the limited class "where denial of immediate review would render impossible any review whatsoever of an individual's claims. . . ." *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). If there is an indictment and conviction, the constitutionality of the search and seizure will be reviewed. If there is no indictment and the property is not returned, appellants can then move for its return.

Appeal dismissed for lack of jurisdiction.

APPENDIX B—Memorandum and Order of the United States District Court for the District of Massachusetts

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IMPERIAL DISTRIBUTORS, INC., ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants.

M.B.D. No. 79-165

MEMORANDUM AND ORDER

July 12, 1979

SKINNER, D.J.

This is a motion for the return of magazines and business records seized pursuant to warrants issued by magistrates in this district and in the district of Rhode Island. A similar motion was presented to the District Court of Rhode Island. Chief Judge Pettine of that court declined to entertain the motion on the ground that the property was being held for consideration by a grand jury in the District of Massachusetts, that an indictment based on this property might be returned, that this matter could be determined on a motion to suppress in the District of Massachusetts, and that he should not interfere with the progress of a criminal case in Massachusetts. A petition for a writ of mandamus directing him to exercise jurisdiction under F.R.Crim.P. 41(e) was denied by the Court of Appeals (No. 78-1559, January 4, 1979), and a petition for writ of certiorari was denied by the Supreme Court of the United States (No. 78-1247, April 23, 1979).

APPENDIX B—Memorandum and Order of the United States District Court for the District of Massachusetts

Suppression of material seized in Rhode Island (or anywhere else) would be properly before a judge of this district if the government intended to use such material in a criminal action returned here. Under Rule 41(e) however, the motion is addressed only to the return of property seized within this district. Disposition of the property seized in Rhode Island must await the filing of a criminal action, or, if it appears that no indictment will be returned, reconsideration by the district judge in Rhode Island. The same principles apply to property seized under warrants issued by state courts of Rhode Island.

I will accordingly consider only the material seized in Massachusetts.

On February 28, 1978, an FBI agent submitted an application for a search warrant to Magistrate Cohen with a supporting affidavit. The affidavit detailed at length the observations of the agent and his colleagues of a series of deliveries by truck of suspected pornography from the plaintiffs' various places of business in Rhode Island to retail pornography outlets in the lower Washington Street area of Boston known as "the Combat Zone." Cartons unloaded at one such truck delivery were observed to contain the magazines *Turkish Delight*, *Sex Foto Fiction No. 1* and *Sex Foto Fiction No. 2*. One of the agents purchased one copy of each of these magazines, and these copies were submitted to the magistrate with the application. The affidavit contained information that a blue panel truck of a certain registration had left plaintiffs' premises in Rhode Island that morning and was expected to make a delivery of suspected pornography immediately.

On the basis of this submission the magistrate entered an order in which he found the three magazines to be obscene and commanded the agents to search the blue panel truck "in order

to determine whether or not there exists therein obscene materials of the same tenor as Turkish Delight, Sex Photo Fiction No. 1 and Sex Photo Fiction No. 2." He also issued a search warrant.

Thereafter the agents seized the truck, arrested the driver and drove the truck to the FBI garage. There is a dispute as to whether it was necessary to move the truck to avoid impeding traffic and causing a public commotion, as reflected in the affidavits of the agent and the driver of the truck. I will assume that it would have been possible to search the truck on the street. In any case, the truck was searched, but nothing was seized. Although seizure was authorized by the terms of the warrant, the agents considered themselves bound by the terms of the contemporaneous order quoted above.

After completing this search, the agent applied for a second warrant to search for and seize nine additional named magazines and five named films, which in his affidavit he claimed to have seen in the truck. The magistrate then boarded the truck and personally viewed the magazines and parts of the films. The magistrate entered an order in which he made a finding that the items were obscene and issued a warrant for the search of the truck and the seizure of the nine named magazines, five named films, and related business records. Three copies of each magazine were seized and one copy of each film, along with business records related to deliveries to retailers in Boston.

The truck was released to the driver after having been held for several hours, but was not in fact removed for several days. The plaintiffs were notified of the seizure immediately thereafter in accordance with the magistrate's order. The complaint against the driver was eventually withdrawn.

APPENDIX B—Memorandum and Order of the United States District Court for the District of Massachusetts

The resolution of this motion turns on the propriety of the issuance and execution of the first warrant.

The facts set forth in the agent's first affidavit were sufficient to authorize a warrant for the search and seizure of suspected contraband other than magazines and films presumptively entitled to the protection of the First Amendment. *United States v. Cortellesso*, ____ F.2d ____ (1st Cir., June 29, 1979). The search cannot be validated as incidental to the valid arrest of the driver of the van for two reasons: (1) the validity of the arrest is subject to the same First Amendment considerations as the search of the van; and (2) it is clear from the affidavits that the agents had determined to search before the arrest was made, or, in short, that the arrest was incidental to the search rather than the other way around.

There are special rules governing the seizure of magazines, books and films resulting from the interaction of the First and Fourth Amendments:

1. Before such material is seized as obscene, a neutral detached magistrate must view the material, "focus searchingly on the question of obscenity" and determine that there is probable cause for the issuance of a warrant. *Marcus v. Search Warrant*, 367 U.S. 717, 731-733 (1961).

2. An adversary proceeding is required before a final restraint on the distribution of such material but not before the seizure of sample items to preserve them as evidence, provided a prompt adversary hearing is available at the request of any interested party. *Heller v. New York*, 413 U.S. 483, 493 (1973).

3. The magistrate may not put himself at the head of a search party and compress the various procedural steps, filling in the search warrant with a description of the items seized after the fact. *Lo-Ji Sales, Inc. v. State of New York*, 47 L.W. 4670 (United States Supreme Court, June 11, 1979).

When a search and seizure of obscene material is proposed to be conducted at a retail outlet or places where the public is invited, the requirement that the material be first submitted to a neutral magistrate may be satisfied by purchasing the offending book or magazine or viewing a film. Enforcement officers who seek evidence against wholesalers and distributors have a more difficult problem: How do they get the material before the magistrate so that he can make the determination prerequisite to the issuance of a search warrant?

In my opinion, the two-stage procedure employed in this case is a reasonable response to the problem, and is a reasonable variant on the procedure suggested by the Ninth Circuit in *United States v. Sherwin*, 572 F.2d 196, 200 (9th Cir. 1977). The first order of the magistrate called for a search only. The truck was detained for only so long as was reasonably necessary to provide an opportunity for a search and review of the suspect material by the magistrate.

Plaintiffs in their brief and argument focus on the impropriety of issuance of the first order and warrant. I have no doubt that there was probable cause apparent in the agent's affidavit for the issuance of the warrant in Fourth Amendment terms. The problems are First Amendment ones.

The affidavit contained a sufficient basis for a finding of probable cause that the plaintiffs were engaged in a continuing

course of conduct of transporting to the Combat Zone material characterized by the agent as obscene, and that the blue panel truck was employed for that purpose. The magistrate not only had the agent's explicit description (which would not have been conclusive), but samples of what he meant by obscene.

Plaintiffs next assert that the direction to search for material "of the same tenor" as *Turkish Delight*, and *Sex Foto Fiction No. 1* and *Sex Foto Fiction No. 2* was not sufficiently specific and left too great a measure of discretion to the agent. To resolve this issue I called for and inspected the magazines in question, over the plaintiffs' objection. The "tenor" of these publications is unmistakable. They are clearly what the Second Circuit has aptly described as "fungible smut." *United States v. Cangiano*, 491 F.2d 906, 913 (2d Cir. 1974).

The asserted danger to First Amendment rights is that police will be unable to distinguish between obscenity and protected material; specifically, that the agents here would be unable to distinguish between *Turkish Delight*, and say, a photo-illustrated edition of *Lady Chatterley's Lover* or *The World According To Garp*, in which explicit sexual descriptions are integral aspects of a literary exposition. Even conceding that the track record of the police as literary critics is poor, I am satisfied that the practical danger is minimal. Even if it existed, it would only last until the magistrate's review, which in this case was prompt. The restraint on the free flow of ideas, if any there were, was scarcely greater than might have resulted from a blown tire on the blue panel truck.

That the search of the truck was accomplished at the FBI garage rather than under public gaze on Washington Street does not raise a constitutional question. *Cf. State of Arkansas v. Sanders*, 47 L.W. 4783, 4786 (United States Supreme Court, June 20, 1979); *Chambers v. Maroney*, 399 U.S. 42 (1970).

APPENDIX B—Memorandum and Order of the United States District Court for the District of Massachusetts

Accordingly, the motion to return seized property is DENIED with respect to the Rhode Island seizure because the material was not seized in this district, and is DENIED with respect to property seized in this district because the seizure violated no constitutional rights of the plaintiffs.

/s/ WALTER JAY SKINNER
United States District Judge

APPENDIX C—Constitutional Provisions and Statutes Involved

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTES INVOLVED

Rule 41 of the Federal Rules of Criminal Procedure

Search and Seizure

* * *

(c) Issuance and Contents

(1) Warrant upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling

on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

* * *

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Supreme Court, U. S.
FILED
SEP 6 1980
MICHAEL RODAK, JR., CLERK

No. 79-1967

In the Supreme Court of the United States

OCTOBER TERM, 1979

IMPERIAL DISTRIBUTORS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Application of the United States, 427 F. 2d 1140 5

Busic v. *United States*, No. 78-6020 (May 19, 1980) 4

Church of Scientology v. *United States*, 591 F. 2d 533, cert. denied, No. 79-529 (Jan. 21, 1980) 5

Cobbledick v. *United States*, 309 U.S. 323 5

DiBella v. *United States*, 369 U.S. 121 5

Lo-Ji Sales, Inc. v. *New York*, 442 U.S. 319 4

Mr. Lucky Messenger Service, Inc. v. *United States*, 587 F. 2d 15 5

Parrish v. *United States*, 376 F. 2d 601 5

Smith v. *United States*, 377 F. 2d 739 5

United States v. *Glassman*, 533 F. 2d 262 5

United States v. *Ryan*, 402 U.S. 530 5

United States v. *Sherwin*, 572 F. 2d 196 5

Page

Constitution, statutes and rule:

United States Constitution:

First Amendment 3

Fourth Amendment 3, 5

18 U.S.C. 371 4

18 U.S.C. 1465 4

Fed. R. Crim. P. 41(e) 1, 5

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1967

IMPERIAL DISTRIBUTORS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners primarily contend that the court of appeals had jurisdiction to consider the order of the district court denying their preindictment Rule 41(e) motion.

1. On February 28, 1978, FBI Special Agent Lawrence Gilligan applied for a warrant authorizing the search of a truck regularly involved in the distribution of pornographic materials from petitioner Imperial Distributors, Inc., in Providence, Rhode Island, to various adult book stores in Boston, Massachusetts. In addition to a detailed affidavit, Agent Gilligan presented the magistrate with three magazines purchased at these book stores and traced to recent truck deliveries from Imperial Distributors. At the time of the application, the truck had just entered Massachusetts from Rhode Island. After reviewing the magazines, the magistrate issued a warrant authorizing Agent Gilligan to search the truck for obscene materials of

the same "tenor" as the magazines that had been presented to him—that is, "magazines [which] depict patently offensive representations or descriptions of ultimate sexual acts, normal or pervert, actual or simulated, and [which] depict lewd exhibition of the genitals" (Feb. 28, 1978 order). The warrant did not, however, authorize the seizure of any materials (Tr. 160-162).

FBI agents located the truck parked in front of an adult bookstore in Boston and, following a brief search, found 38 cartons of patently pornographic materials. In view of the surroundings and the nature of the search, the agents decided to bring the truck to a nearby FBI garage. Following a more thorough search, Agent Gilligan sought a second warrant regarding the seizure of nine magazines, five films, and certain business records. The magistrate came to the FBI garage, reviewed the magazines and films designated in Gilligan's affidavit, and issued a second warrant for the seizure of evidentiary copies of the materials.[1] On the same day, FBI agents obtained a warrant to search the premises of Imperial Distributors, Inc. in Providence, Rhode Island, and thereafter seized various business records.

2. Shortly after the seizure, petitioners filed a motion in the United States District Court for the District of Rhode Island seeking the return of their property. That court abstained from adjudicating petitioners' contentions in order to avoid a conflict of jurisdiction between the District of Rhode Island and the District of Massachusetts, where a federal grand jury investigation of petitioners was underway. The court of appeals summarily denied petitioners' request for a writ of mandamus (No. 78-1559 (1st Cir. Jan. 4,

---

[1] For evidentiary purposes, the magistrate authorized the agents to seize three copies of each of the nine named magazines and two copies of each of the five named films.

1979)), and this Court denied a petition for a writ of certiorari. *Imperial Distributors, Inc.* v. *Pettine*, 441 U.S. 927 (1979).

Petitioners thereafter filed a motion for return of property in the District of Massachusetts, alleging that the search and seizure was unlawful. On July 12, 1979, the district court denied the motion, finding that both the first and second warrants were supported by probable cause. The court also rejected petitioners' contention that the first warrant, which authorized a search of the truck for materials of the same "tenor" as the three magazines inspected by the magistrate, was insufficiently specific. The court pointed out that the "tenor" of the three magazines was "unmistakable" and could be described as "fungible smut" (Pet. App. A-14). In addition, the court expressly approved the two-stage warrant procedure used by the magistrate. The court noted that when the government is investigating a wholesale distributor of pornography—as opposed to a retailer—it is not possible simply to buy a copy of the offensive material and bring it to a magistrate for a probable cause determination (*id.* at A-13). Accordingly, the court concluded that the minimally intrusive first search, followed by an independent magistrate's review prior to the seizure of the allegedly obscene magazines, fully satisfies the requirements of the First and Fourth Amendments (*id.* at A-13 to A-14).

Petitioners sought to appeal the order of the district court, but the court of appeals dismissed the appeal for lack of appellate jurisdiction. The court held that although petitioners captioned their motion in the district court a "Motion for Return of Property" it was in reality merely a motion to suppress evidence (Pet. App. A-6 to A-7). The court observed that only three copies of nine magazines and two copies of five films out of a total of 38 cartons of films and magazines were seized and that petitioner had not responded to the government's offer to make copies of

their business records. Nor had petitioners indicated that they needed the property that had been seized (*ibid.*). Because the denial of a motion to suppress is generally not appealable prior to trial, the court held that petitioners must wait until they have been convicted and sentenced and then challenge the seizure on appeal, or "[i]f there is no indictment and the property is not returned, [petitioners] can then move for its return" (Pet. App. A-8).

3. Petitioners contend (Pet. 8-12) that the court of appeals erroneously dismissed their appeal for lack of jurisdiction.[2] At the outset, we submit that review by the Court at this time is unwarranted. An indictment charging four of the petitioners and others with violating 18 U.S.C. 1465 and 371 has now been filed in the United States District Court for the District of Massachusetts. The district court has set September 8, 1980 as a trial date and, on petitioners' motion, has agreed to reconsider the lawfulness of the searches and seizures that are the subject of petitioners' appeal. Thus, petitioners now have a full opportunity to submit their claims to the lower courts. If petitioners' renewed motion to suppress is granted or if petitioners are acquitted at trial, their claims will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed, they will then be able to present all of their substantive contentions to this Court by seeking review of the final judgment.

---

[2]Petitioners also challenge (Pet. 12-17) the bipartite search and seizure that occurred. The court below did not reach the merits of that claim and this Court would not ordinarily consider that issue in the first instance. See, *e.g.*, *Busic* v. *United States*, No. 78-6020 (May 19, 1980), slip op. 14 n.19. In any event, this case is readily distinguished from *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979), on which petitioners rely. Here, upon a showing of probable cause, the magistrate properly permitted a limited search of petitioner Guarino's truck without significantly disrupting either petitioners' wholesale

Similarly, the fact of indictment essentially moots petitioners' appealability question. Even if the court of appeals could have considered petitioners' Fourth Amendment claim prior to their indictment,[3] it now plainly lacks jurisdiction to consider what would be an interlocutory appeal in a criminal case. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *DiBella* v. *United States*, 369 U.S. 121 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940). And that well settled rule against piecemeal appeals in a criminal case applies to those petitioners who were not indicted, as well as to the four that were. See, *e.g.*, *Cobbledick* v. *United States, supra*, 309 U.S. at 324-325; *Church of Scientology* v. *United States*, 591 F. 2d 533, 537 (9th Cir. 1979), cert. denied, No. 79-529 (Jan. 21, 1980); *Application of the United States*, 427 F. 2d 1140, 1141 (5th Cir. 1970); *Parrish* v. *United States*, 376 F. 2d 601, 603 (4th Cir. 1967).

---

distributing business or their customers' retail business. See *United States* v. *Sherwin*, 572 F. 2d 196, 200 (9th Cir. 1977). Thereafter, the magistrate made a neutral, detached determination that several of the magazines and films were obscene, and he therefore permitted the agents to seize two or three copies of the offensive materials for evidentiary purposes. The truck was then permitted to deliver the bulk of its cargo.

[3]But see, *e.g.*, *United States* v. *Glassman*, 533 F. 2d 262, 263 (5th Cir. 1976); *Church of Scientology* v. *United States*, 591 F. 2d 533 (9th Cir. 1979), cert. denied, No. 79-529 (Jan. 21, 1980); *Smith* v. *United States*, 377 F. 2d 739, 742 (3d Cir. 1967). Petitioners do not allege that they need the property or that the government's continued retention of the property for use in the criminal proceedings somehow threatens them with irreparable harm. Compare *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F. 2d 15, 17 (7th Cir. 1978). In any event, because petitioners have now been indicted, this case does not present a suitable occasion for the Court to consider the preindictment appealability of an order denying a Rule 41(e) motion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09